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In the

Supreme Court of the United States

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* INTERSCHOLASTIC ASSOCIATIONS IN SUPPORT OF RESPONDENTS (*Amici* Listed on Inside Cover)

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WISCONSIN INTERSCHOLASTIC ATHLETIC ASSOCIATION

WYOMING HIGH SCHOOL ACTIVITIES ASSOCIATION

ON BEHALF OF RESPONDENTS

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually

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STATEMENT OF ISSUE PRESENTED

The issue addressed in this brief is whether the Tennessee Secondary Schools Athletic Association ("TSSAA") and other similar private, interscholastic associations are "state actors" when operating their respective associations in their respective states.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, similar to the TSSAA, are private, voluntary interscholastic (as opposed to intercollegiate) associations. While the structure of each of the *Amici* may vary slightly, each shares significant key traits with the TSSAA which renders the present case of critical importance to their historical status as private associations subject to contract and other laws of their respective states. Were the decision of the Sixth Circuit reversed, a consequence would be a drastic alteration of the law of each state as that law pertains to the authority and status of each *Amici*. If the Sixth Circuit decision is affirmed, the decision will provide clear guidance in all states in connection with disputes arising between and among the private school and public school members of each voluntary association relative to the enforcement of the rules of each such association. Affirmance will result in the treatment of interscholastic associations like all other private associations under state law, consistent with and pursuant to the terms of the constitution, by-laws or other organizational agreement of each association, freely adopted by and between the member entities.

SUMMARY OF ARGUMENT

The TSSAA does not act under color of state law because interscholastic associations do not perform a public function traditionally and exclusively reserved to the state, the state does not control or coerce the conduct of interscholastic

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no person or entity other than the *Amici,* their members, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a).

associations, the state is not legally responsible for the conduct of most interscholastic associations, and there is no symbiotic relationship between the state and interscholastic associations. In other words, it cannot be rationally argued that the *Blum Trilogy* presents law which is unclear or supports a finding of state action. Petitioner and its *Amici* instead believe there is state action in this case based almost exclusively on their finely parsed reading of one of the sentences in *Tarkanian* footnote 13 (the other sentence plainly militates against state action). However, *Tarkanian* footnote 13 does not answer the question of whether a private association of schools is a state actor, it foresees the question. There may be instances where an interscholastic association is a state actor, such as where the association is an explicit structural arm of state government. However, where the association has no such characteristic—like the TSSAA—but is a purely voluntary association independent of state control, oversight, regulation, funding, etc., there is absolutely no basis to find it a state actor under this Court's precedent.

ARGUMENT

I. STRUCTURE AND FUNCTION OF TSSAA.

The structure and function of the TSSAA should determine whether this Court finds it to have been a state actor when it enforced its democratically adopted "Recruiting Rules" against a private member, Brentwood Academy. Examination of how an association came to exist, and under what authority it acts under its state law, is essential to this determination. What a private association such as the TSSAA is and what it is not, what it does and what it does not do, and what it can and cannot do, are necessarily dispositive in analyzing whether the association is a state actor or acted under color of state law for purposes of 42 U.S.C. § 1983 in the case *sub judice*.

A. Analysis of TSSAA and Interscholastic Associations.

It is thus significant for this court to consider that not all interscholastic associations are the same. While some interscholastic associations have a significant level of state involvement, most have virtually no involvement with the state, and no more than any person or corporation may have by doing business with an agency of the state. The first class of associations are created by state statute, as in California and Texas, or exist pursuant to the express authority of the legislature, as in Iowa and Kansas. (See Appendix A attached hereto). Most associations, like the TSSAA, are not created by state statute and the Association's authority is not granted by the legislature in any way. The TSSAA, like many other such associations, is not created, governed, operated, funded, or controlled by a state department of education. That absence of control is to be compared with the states of Alaska and Maryland, which are governed, or to some extent controlled, by a state board of education. (Appendix A). Clearly, where the legislature of a state has deemed state involvement in interscholastic competition to be necessary, those states have enacted legislation to bring such activities under the aegis of the state to the extent each deems appropriate. Conversely, the right of states such as Tennessee to keep such activities separate from the state should not be undermined.

In some states, including Tennessee and *Amici*, the state legislature does not grant authority to the Association. Other states' codes, including Arizona and Minnesota have some recognition even though control is absent. With regard to state funds, most associations do not receive any of their annual revenue directly from the state. In fact, certain *Amici*, such as the Illinois Association and Michigan Association do not even charge an annual membership fee. By contrast, Delaware and the District of Columbia do receive revenue directly from the state government. (Appendix A.)

Certain other basic characteristics of the TSSAA should also be factored into the state action analysis. The TSSAA, like all of the *Amici* and many other interscholastic associations, are private, not for profit, tax exempt organizations (26 U.S.C. § 501(c)(3)) which have as one of their primary goals the development of rules for fair and equitable participation in interscholastic activities. *Amici's* members, like the TSSAA membership, are comprised of private, parochial, and public high schools located throughout each state, all of which voluntarily join the associations. In some states a member school is even located in an adjoining state[2] and in all states, the member schools compete against schools in adjoining states. No high school, public or private, is required to become a member, and not all schools are members of their state's association.[3]

All of the member schools of the TSSAA like the members of all *Amici*—private, parochial and public—adopt by majority vote a constitution and a set of by-laws and competition rules which govern interscholastic competition among their voluntary members. The reason for this is to have a uniform set of regulations to create a level playing field when one member plays a contest against another member. The TSSAA and these *Amici* do not administer any aspect of the state's mandated educational curriculum, including physical education. The by-laws ultimately adopted by the member schools are discussed on a national level through private entities such as the National Federation. The play-

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[2] In fact, a school located in Kentucky is a member of the TSSAA. Several schools in California belong to the Nevada association. Nearly every state crosses borders in competition between schools and North Dakota even has members from Canada.

[3] For instance, there are at least 28 schools which are not members of the Illinois High School Association, 30 schools which are not members of the Ohio High School Athletic Association, and 30 public and private schools in Louisiana which are not members of the Louisiana High School Athletic Association.

ing rules, likewise, are developed with the assistance of independent agencies, such as the United States Olympic Committee and the National Collegiate Athletic Association, in a given sport. The by-laws for interscholastic competition in all states are similar and routinely discussed so that a student moving from one state to another or a team from one state competing against a team from another state know that they are participating and playing under similar if not identical participation and conduct rules.

The cooperative efforts of the state, national and international organizations result in by-laws and other sports rules which govern competition sponsored and administered by the interscholastic association, with the association in each state maintaining its autonomy. Each school which is a member of the association has equal representation in the association's activities. Each private and public school in Tennessee (as in other *Amici* states)—including Brentwood Academy—has an equal voice in its Association's governance. Because of this voluntary participation, representation, and governance, it is well established that judicial review of a private association's conduct is available through the state courts subject to whether the association exercised its powers consistently with its own internal rules,[4] in a non-arbitrary or capricious manner. *See e.g. Kirby v. The Michigan High School Athletic Association,* 585 N.W. 2d 290 (Mich. 1998); *Kansas State High School Activities Association*, 917 P. 2d 836 (Ks. 1996); *Robinson v.*

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[4] There are some who have attempted to modify the issues in this case to promote their single minded agendas by raising concerns of school choice, sex discrimination and Title IX, race discrimination, voting rights, and potential remedies against state interscholastic associations outside the state courts. While their participation and advocacy for their particular cause is admirable, the arguments raised in their briefs are simply not at issue. This case does not address, pertain to, or affect parental choice of schools, Title IX, voting rights or discrimination. Rather, the issue before this Court is whether the TSSAA acts under color of state law.

Illinois High School Association, 195 N.E.2d 38 (Ill. App. Ct. 1963); 6 Am.Jur.2d, Association and Clubs, § 8, p. 399 (1999).

The board members of the TSSAA and *Amici* are elected from the membership as a whole. Each board member then represents all private, parochial and public schools in his or her region or even statewide. Contrary to Petitioner's brief, the board members do not represent their individual school when serving on the board and exercise no authority of or granted by their school. (Pet. Brief, p. 48). Moreover, board members are not acting as agents of their school employers when serving on the board of directors, but instead are acting as private citizens.

The board members can be and often are elected from private schools.[5] It is simply happenstance that at the present time the board members of the TSSAA are from public schools. The rules and regulations of the TSSAA, like *Amici,* are therefore not administered by the public school component of the Association's membership but by individuals representing public and private schools alike. For example, under the Illinois High School Association Constitution and By-laws, like that of the TSSAA, the executive director and the staff are vested with the duty and authority to determine whether a member school and/or individual student is in compliance with the by-laws. The executive director is selected by a board of control which board is elected by **all** members, each of which may nominate and elect its principal or other representative, including non-public employees, clergy or the religious head of the school, to the board. There is no requirement that the executive director or staff of the association or any board member be

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[5] At the present time there are board members from private and parochial schools on the Georgia, Hawaii, Idaho, Louisiana, Michigan, Ohio, Wisconsin, and Wyoming associations, among others with some such positions guaranteed by the governing contract of the associations.

a public employee. Indeed, the executive director of the TSSAA is a private citizen, not a state employee, and has no voting rights on the Board.

The mere fact that an interscholastic association is composed of a majority of public members does not convert it to a state actor; it simply means there are more public schools than private schools desiring to join such an association. While the public school component of the TSSAA may be one factor for consideration as pointed out in *Tarkanian* footnote 13, it is not the talisman of state action analysis under the *Blum* Trilogy. See part II, *infra*. If it were, the result for many private athletic associations, including the Amateur Athletic Union, National Collegiate Athletic Association, USA Hockey and others would be incongruous. It may also serve to indirectly elevate athletics to fundamental right status in direct contravention of the uniform consensus of federal and state courts (See footnote 8, *infra*), and open the floodgates to the federal courts for students who feel they have been wronged by one of the thousands of eligibility decisions made annually by interscholastic associations.

It is therefore evident that *Tarkanian* footnote 13 foresaw, but did not answer the question of whether an association of public and private schools is a state actor. Otherwise, it would be necessary to confront the seemingly contradictory first and second sentences of the footnote. This appears to be recognized by Petitioner and many of its *Amici*, including part IV of the *amicus curiae* brief of the Tennessee Lawyers' Association For Women, wherein they struggle to solve the apparent incongruity. However, they fail to recognize the most rational explanation of the footnote—this Court was not deciding the issue because the issue was not before it. As a result, there is nothing whatsoever contradictory about the footnote. The court decisions relied upon by Petitioner and its *Amici* simply rely upon the first sentence of footnote 13 without any regard for or analysis of the second sentence or the issue of state actor

status as this Court analyzed the question in the body of the *Tarkanian* opinion. (See footnote 7, *infra*.)

B. Brentwood Cannot Avoid its Agreement to Abide by TSSAA Rules.

In the TSSAA, private schools enjoy equal status to public schools. Each member school has identical legislative and identical elective rights, regardless of the size or location of the school or whether the school is public or private. By joining, the rules of the association become the rules of each member school agreed upon by the members schools. Thus, when Brentwood joined the association, which it was not mandated to do, it agreed to abide by the Recruiting Rule here in question. All schools, including Brentwood, benefit equally from the rules. It is therefore disingenuous for a member school to now complain about the rules it voluntarily accepted and participated in forming simply because it was found to have violated those rules in a given instance.

The member schools of the *Amici* have adopted recruiting rules similar to that of the TSSAA. Like the other rules of the associations, the Recruiting Rule is rationally designed to address genuine concerns of the membership, such as discouraging the exploitation of students; providing maximum opportunity for all students to participate; discouraging adults from jeopardizing a student's eligibility; preventing the misuse of athletic programs; preventing district hopping; discouraging school selection for solely athletic reasons; maintaining a competitive balance among member schools and their students; preventing recruiting abuses; preventing red-shirting;[6] ensuring equality of competition between member schools; and, ensuring that sports do not

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[6] Red-shirting is not permitted at this level of competition. Red-shirting, or the holding back of an athlete so that they compete at a more mature age, is a useful recruiting tool.

assume greater importance than academics. In short, at the high school level recruiting is not regulated—it is prohibited. As a means of addressing these concerns, such rules have been developed and are administered in a framework completely free of regulation or interference by the state. To alter this well established framework would result in detriment to not only the Association's members and their rights of free association and contract, but more importantly the interests of individual students.

There is also a possible misconception concerning the extent of the involvement of the TSSAA and *Amici* in the athletic and other extracurricular events in which schools and students choose to participate. During the vast majority of the school year, member schools compete among themselves under nationally recognized contest rules, but pursuant to their individual scheduling choices throughout a particular activities' season. The TSSAA and *Amici* are not involved in those events, do not run those events, do not sponsor those events, and do not control those events or receive any revenue from those events. Rather, the only events controlled by the TSSAA and *Amici* are the end of season tournaments: here, the association statewide football tournament. As a result, the overwhelming majority of athletic and other extracurricular events take place outside any control of the interscholastic association, while eligibility is subject to the rules if that school wishes to participate in association post season tournaments.

C. The Location of Association Sponsored Competition Does Not Make the Association a State Actor.

An activity common to the TSSAA and the *Amici* is the organization of tournaments. The location of such tournaments varies from the gymnasia of member schools to fieldhouses of public and private universities to private facilities, such as the Carver Arena in Illinois, the Super Dome in Louisiana, Vanderbilt University in Nashville, and num-

erous other private tennis and golf clubs. When an association conducted event (i.e. a tournament) is held at the location of a member school—whether it be a private, parochial, or public school—the association contracts with the member school to use the facility, just like any other private party using the school facility, and a rental charge or percentage of gate receipts is paid to the school by the association. In a rare instance, a local school board may decide to offer its facility rent-free, but even then some financial accommodation is made for use of the facility. Petitioner's attempt to place reliance on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) is therefore completely misplaced (see part II, *infra*).

In sum, the structure and function of the TSSAA and *Amici* do not support a finding of state action under the factors traditionally analyzed by this Court. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); and *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). In light of the above-mentioned characteristics, these private and voluntary associations are not state actors simply because some, albeit even a majority of their members, are public schools.

II. THE TSSAA IS NOT A STATE ACTOR UNDER THIS COURT'S PRECEDENT.

At the outset, it is important to recognize the distinction between "state action" which is proscribed by the Fourteenth Amendment and "private conduct" which is not so proscribed. This distinction remains deeply embedded in constitutional law and first emanated from early decisions of this Court, *United States v. Cruikshank*, 92 U.S. 542, 554-555 (1875); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) and the *Civil Rights Cases*, 109 U.S. 3, 11 (1883). As a "fundamental fact of our political order", this Court has warned that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by

limiting the reach of federal law and federal judicial power," *Lugar v. Edmundson Oil Company*, 457 U.S. 922, 936-937 (1982) and that "courts must consider from time to time where the governmental sphere ends and the private sphere begins," *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 620 (1990). Thus, the Constitution permits citizens to "structure their private relations as they choose," *Edmonson*, supra at 619. Petitioner acknowledges these important principles [See Petitioner's Brief at p. 19-21].

No state action inquiry of the TSSAA should proceed without regard for the outer boundaries and defined contours of proper state action analysis restated by this Court in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) and *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982). These cases, commonly referred to as the "Blum Trilogy", contain bedrock principles that were intended to guide federal courts in determining when private actions may or may not be fairly attributable to the state to constitute state action. The Court of Appeals Opinion, 180 F.3d 758 and the Order Denying Rehearing En Banc, 190 F.3d 705 were consistent with these principles and the District Court decision was not, 13 F. Supp. 2d 670.

Petitioner and several of its *Amici*, contend that there is a consensus of opinion nationwide that state interscholastic associations are state actors. A review of the cases cited, however, reveals that such an assertion is unwarranted. In several cases cited there is no discussion whatsoever of the state action question.[7]

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[7] *See Alerding v. Ohio High School Athletic Ass'n*, 779 F.2d 315 (6th Cir. 1985) (finding in favor of the association on other grounds without considering state action); *Crane v. Indiana High School Athletic Ass'n*, 975 F.2d 1315 (7th Cir. 1992) (decided on state law, rather than constitutional, grounds); *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3d Cir.

(continued...)

A. The TSSAA Does Not Perform A Public Function Traditionally and Exclusively Reserved to the State.

Turning first to the public function test, the TSSAA is not a state actor if the public functions it performs are not **traditionally and exclusively** the State's prerogative, *Blum v. Yaretsky*, 457 U.S. 991 at 1005, 1011-1012 citing *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 353 (1974) and *Rendell-Baker v. Kohn*, 457 U.S. at 842. To prevail on this theory, a plaintiff must show more than the performance of a public function, but that the function is one "exclusively reserved" to the State. *Perkins v. Londonderry Basketball Club*, 196 F3d 13 at 19 (1st Cir. 1999).

In *Blum v. Yaretsky*, supra, this Court declined to find state action under the public function test because it found that the administration of a nursing home was not such a public function **traditionally** and **exclusively** reserved to the sovereign, 457 U.S. at 1011-12 (emphasis added). Likewise, in *Rendell-Baker v. Kohn*, supra, this Court declined to declare the private operator of a school for maladjusted high school students a state actor for similar reasons holding that such public services were not the "exclusive province of the State." 457 U.S. at 842. *See also, Edmonson*

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[7] (...continued)
1978) (state action not an issue in appeal). Many cases simply state that the association is a state actor with little or no analysis of the issue, often citing only to *Tarkanian*, *See, e.g., Brewer v. Purvis*, 816 F. Supp. 1560, 1575 (M.D. Ga. 1993); *Libby v. South Inter-Conference Ass'n*, 728 F. Supp. 504, 506 (N.D. Ill. 1990); *Robbins v. Indiana High School Athletic Ass'n*, 941 F. Supp. 786 (S.D. Ind. 1996). Many which applied some state action analysis to determine the issue, were decided prior to the *Blum* trilogy. *See, e.g., Brenden v. Independent School Dist. 742*, 477 F.2d 1292 (8th Cir. 1973); *Kelley v. Metropolitan County Bd. of Educ. of Nashville and Davidson County, Tenn.*, 293 F. Supp. 485 (M.D. Tenn. 1968); *Louisiana High School Athletic Assoc. v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968).

v. Leesville Concrete Company, 500 U.S. at 624 (holding that a jury is a "quintessential governmental body" which performs "critical governmental powers"). As observed by Justice O'Connor in her dissenting opinion in *Edmonson*, state action under the public function doctrine requires that the "conduct must not only comprise something that the government traditionally does, but something that **only** the government traditionally does." 500 U.S. at 640.

It is settled law in this Court that "neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 at 545 (1987). In accord with *San Francisco Arts & Athletics*, Id. and *NCAA v. Tarkanian*, 488 U.S. at 197-198 n. 18 (1988) (holding that the function of fostering amateur athletics at the college level is by no means a "traditional, let alone exclusive state function"), are *McCormack v. NCAA*, 845 F.2d 1338, 1346 (5th Cir. 1988) (coordination and oversight of intercollegiate athletics may serve a public purpose, but hardly a function traditionally reserved exclusively to the state; and *Ponce v. Basketball Federation of the Com. of Puerto Rico*, 760 F.2d 375, 381 (1st Cir. 1985) stating:

> If education is not traditionally an exclusive function of the state *id.*, then *a fortiori,* neither is the regulation of amateur sports. Amateur sports groups commonly receive assistance from the state in the form of state-maintained or state-operated playing fields, but that it has traditionally been the state's sole province to decide the number of teams, the range of sports, eligibility requirements and many other details is not a supportable assertion. That the state or municipality may assist the cause of amateur sports, through regulation or financial support, does not make the state's role one traditionally and exclusively reserved to it. *Arlosoroff v. National Collegiate Athletic Association*, 746 F.2d 1019, 1021 (4th Cir. 1984).

Underscoring the proposition that extracurricular high school athletics is not a traditional function nor the **exclusive prerogative** of the state is a virtual avalanche of state and federal cases generally holding that there is no "fundamental right" to play high school athletics protected by the Fourteenth (14th) Amendment to the U.S. Constitution.[8]

In its state action analysis below, the District Court in this case made no factual or legal finding that either the conduct or coordination of amateur athletics was a public function **traditionally** and **exclusively** reserved to the state. *See* 13 F. Supp. 2d 679-685. Instead, the District Court merely referred to education as a "traditional function of the state" and extracurricular activities as an "important component of an education in today's modern society." 13 F. Supp. 2d at 685 citing another Pre-*Blum* district court in *Barnhorst v. Missouri State High School*

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[8] *Walsh v. Louisiana High School Athletic Ass'n.*, 616 F.2d 152, rehearing denied, 621 F.2d 440 (5th Cir. 1980); *Mitchell v. Louisiana High School Athletic Ass'n.*, 430 F.2d 1155 (5th Cir. 1970); *Sullivan v. University Interscholastic League*, 599 SW2d 860 (Tex. Civ. App. 1980); *Blue v. University Interscholastic League*, 503 F. Supp. 1030 (N.D. TX. 1980); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985); *Bucha v. Illinois*, 351 F. Supp. 69 (N.D. Ill. 1972); *Herbert v. Ventetuolo*, 638 F.2d 5 (1st Cir. 1981) affirming Rhode Island Supreme Court at 480 A2d 403 (1984) deciding same question under Rhode Island State Constitution; *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975); *Kulovitz v. Illinois High School Ass'n.*, 462 F. Supp. 875 (N.D. Ill. 1978); *Jones v. Oklahoma Secondary Schools Activities Ass'n.*, 453 F. Supp. 150 (W.D. Okla. 1977); *Moreland v. Pennsylvania Interscholastic Athletic Association*, 572 F.2d 121 (3d Cir. 1978); *Paschal v. Purdue*, 320 F. Supp. 1274 (S.D. Fla. 1970); *Taylor v. Alabama High School Athletic Association*, 336 F. Supp. 54 (N.D. Ala. 1972); *Niles v. Texas University Interscholastic League*, 715 F.2d 1027 (5th Cir. 1983) and *Oklahoma High School Athletic Association v. Bray*, 321 F.2d 269 (10th Cir. 1963).

Activities Association, 504 F. Supp. 449 (W.D. Mo. 1980). Even though the District Court below was fully aware of this Court's decision in *Blum v. Yaretsky*, 13 F. Supp. 2d at 679, it refused to follow this Court's directive in *Blum* that state action cannot be established under the public function test unless the public function is one **traditionally** and **exclusively** reserved to the state. *Blum v. Yaretsky*, 457 U.S. at 1011-12. Moreover, the District Court and Petitioner totally ignored this Court's decision in *San Francisco Arts & Athletics v. U.S. Olympic Committee*, *supra*, (neither the conduct nor coordination of amateur sports is even a traditional governmental function). The Sixth Circuit was obviously not fooled by this approach to the issue.

In its Brief before this Court, the Petitioner engages in the same slight of hand approach as the District Court describing athletics as an "important component of education in today's modern society" (Petitioner's Brief, p. 14-15) and "an integral component of the state's educational system" (Petitioner's Brief, p. 35). Thus, by ignoring "exclusive prerogative of the state" the Petitioner invites this Court's return to Pre-*Blum* analysis of state action which has been described as a "conceptual disaster area." Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harvard L. Rev. 69 at 95 (1967). The Petitioner's Brief before this Court is totally devoid of any argument that state action can be found here under application of the public function test, and the silence is deafening. The Petitioner appears to have abandoned any hope of sustaining state action under the public function test within the strict guidelines recognized by this Court.

B. The State of Tennessee Is Not Legally Responsible For The Challenged Conduct of The TSSAA.

Constitutional standards cannot be invoked on a private party unless it can be said that the state is "**responsible** for the specific conduct of which the plaintiff complains."

Blum v. Yaretsky, supra, 457 U.S. at 1004. A state cannot be held responsible for a private decision unless it has "exercised coercive power or provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, supra, 457 U.S. at 1004. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment," *Blum v. Yaretsky*, supra, 457 U.S. at 1004-1005 (citations omitted). The fact that a private party is subject to extensive regulation by the State does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. *Blum v. Yaretsky*, supra, 457 U.S. at 1004 citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The receipt of public funds does not make one a state actor. *Rendell-Baker v. Kohn*, 457 U.S. at 840 citing *Blum v. Yaretsky*. Performance of a public contract does not make one a state actor, *Rendell-Baker v. Kohn*, 457 U.S. at 840-841. And it is not enough even if individual members of an athletic association, acting collectively with non public members, are themselves public institutions which could be classified as state actors. *NCAA v. Tarkanian*, supra, 488 U.S. at 191-199 (1988).

Petitioner here cannot prevail because it cannot show that the TSSAA Recruiting Rule in particular was compelled or influenced by state regulation. Despite extensive regulation of the school under review in *Rendell-Baker v. Kohn*, this Court held that the discharges of petitioners there were not compelled or influenced by any state regulation. 457 U.S. at 841. Likewise, in *Blum v. Yaretsky*, it could not be shown that the discharge or transfer of particular patients receiving Medicaid benefits was influenced or required by state regulations. 457 U.S. at 1005. There is absolutely no record in this case that the TSSAA Recruiting Rule was compelled, required or influenced by any official

action of the State of Tennessee.[9]

Petitioner also argues erroneously that the extracurricular amateur athletic program operated by the TSSAA is part of the free public education mandated by the Tennessee Constitution, Article XI, Section 12 [Petitioner's Brief p. 8, 39, 42, 43]. Courts deciding the outer boundaries of state constitutional provisions requiring free public schools for the gratuitous instruction of all citizens below a certain age do not create a "state entitlement" for participation in "extracurricular athletics." See *State ex rel. Indiana High School Athletic Association v. Lawrence*, 162 N.E.2d 250 at 255 (Ind. Sup. Ct. 1959) holding that Article 8, Section 1 of the Indiana State Constitution requiring common schools to impart knowledge and learning without charge did not extend to "extracurricular activities;" and *Smith v. Crim*, 240 S.E.2d 884 at 885 (Ga. Sup. Ct. 1977) holding that provisions of Georgia law requiring tuition-free education for all children six to nineteen years old did not include "extracurricular" sports; and *Berschback v. Grosse Point School District*, 154 Mich. App. 102 (1986) at 117-118 holding:

> Although Michigan law may, through its compulsory education statute, create a protected interest in public education, this protected interest in public education does not extend to a student's participation in interscholastic sports. . . . The compulsory education statute may create a protected, legitimate claim of entitlement to basic classroom attendance, but, alone, it does not create a legitimate claim of entitlement to participation in interscholastic athletics.

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[9] However, it is noteworthy that the headmaster of a private independent school authored some of the printed guidelines used for understanding and interpreting the TSSAA Recruiting Rule while serving as Vice President of the TSSAA Legislative Council [See Respondent's Brief, Statement of the Case].

Thus, courts distinguish between that which is "curricular" and that which is "extracurricular" in defining the outer limits of what public schools are mandated to provide their citizens under state constitutions. The Petitioner is obviously trying to blur the distinction between physical education programs offered within the mandated curriculum of schools and extracurricular activities of which neither Petitioner nor its *Amici* make any mention of or distinction between, preferring to further blur the lines of distinction. There is a distinct difference because state constitutions do not mandate extracurricular forms of education, though hopefully students learn from their experience, including the obligations to comply with reasonable and necessary rules.

Petitioner abandons in its Brief any argument that the TSSAA Recruiting Rule was adopted or enforced against Petitioner by the State of Tennessee through the exercise of "coercive power," *Blum*, supra, 457 U.S. at 1004. Instead, Petitioner argues that the State of Tennessee provided "significant encouragement" [Petitioner's Brief p. 48-50]. Does the Petitioner do this because it cannot make a case for the exercise of "coercive power" and views the "significant encouragement" test as a lower standard? To the contrary, "significant encouragement" must be read with "coercive power" and cannot support a determination of state action unless the choice must in law be deemed to be that of the state. *Blum*, supra, 457 U.S. at 1004.

The Petitioner is completely and utterly wrong when it argues that the TSSAA "simply could not exist" without the "overt, significant participation of the government" [Petitioner's Brief p. 49]. The TSSAA came into existence in 1925 and exists today through the free exercise of a contract between private, parochial and public school members and not through the coercion or significant encouragement of any Tennessee constitutional provision, statute or governmental regulation. The TSSAA exists, but does not receive any direct subsidy from public tax funds and generates

almost all of its entire operating budget from gate receipts at playoffs and championship tournaments [Respondent's Brief, Statement of the Case]. The TSSAA exists, but membership is voluntary without any state coercion or encouragement. The TSSAA exists, but no accreditation criteria for any public or private school in the State of Tennessee requires membership in the TSSAA. The TSSAA exists, but no wages or retirement benefits of the TSSAA Executive Director or any TSSAA staff are paid by the State of Tennessee. The TSSAA exists, but no decisions by the TSSAA Board of Control or Legislative Council are directly appealable to any government agency or state judicial body with plenary authority to overrule or change the same ouside the common law of Tennessee. The TSSAA exists, but is not dependent on the rent free use of public facilities for its playoffs or championships while paying rent for public and private facilities and holding many of its championship events at private institutions (i.e., state football championship at Vanderbilt University). The TSSAA exists, but does not occupy a public building at taxpayer expense for its executive offices. The TSSAA exists, but does so without any direct regulation of the Tennessee State Board of Education. The TSSAA exists, but does not enjoy or exercise state power to subpoena witnesses, impose contenpt citations or exercise sovereign authority over any individual apart from its contractual authority over member schools. And finally, the TSSAA exists, but does not enjoy sovereign immunity from civil lawsuits. While one must admit that TSSAA programs, budget and activities would be substantially smaller if public schools withdrew from TSSAA membership, it would not cease to exist.

Reduced to simple expression, Petitioner chiefly argues that state action must be sustained simply because the TSSAA Board of Control and Legislative Council **at the time of enforcement** consisted of administrators from public schools. However, the Petitioner fails to recognize that these administrators were not **sent** to their positions

with the TSSAA based upon the unilateral actions of their respective school boards, but were individuals selected and called to serve upon a vote in which all private, parochial and public school members of the TSSAA voted. One must only assume that Petitioner operates from an erroneous belief or a belief not supported by evidence in the record below, that no private school member would ever vote for a public school administrator and vice versa.

It is not enough to simply point to the involvement of public school administrators on the TSSAA Board of Control and Legislative Council, but Petitioner must show that the professional judgments or decisions of these athletic administrators to adopt and/or enforce the TSSAA Recruiting Rule were required or influenced by the State of Tennessee. *See Blum v. Yaretsky*, supra, (citing *Polk County v. Dodson*, 454 U.S. 312 (1981) and stating that those decisions ultimately turn on professional judgments made by private parties based upon professional standards that are not established by the State). (457 U.S. at 1008-1010).

As recognized by the Fifth Circuit U.S. Court of Appeals in *McCormack v. NCAA*, 845 F.2d 1338, 1345-1346 (1988), substantial or even pervasive involvement of state funded public schools in an organization which coordinates amateur athletics is not enough alone to meet the test of state action under *Blum v. Yaretsky* and *Rendell-Baker v. Kohn*, even when, as in *McCormack*, all but one member was from the same state in the conference. Otherwise, thousands of private parties and associations doing business with a public school would arguably also become state actors.

The involvement of the State of Tennessee in affairs of the TSSAA is far less extensive than the government in affairs of the United States Olympic Committee which were reviewed by this Court in *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522 (1987) (congressionally granted charter to U.S.O.C. and exclusive use of word "Olympic," congressional regulation of U.S.O.C. and direct funding of U.S.O.C. by the government).

Neither the defacto nor dejure relationship of the Tennessee State Board of Education (SBE) to the TSSAA appears anything more than mere approval or acquiescence and that, simply put, is not enough, *Blum v. Yaretsky*, supra, 457 U.S. at 1004-1005. As such, the State of Tennessee would not be legally responsible for actions of the TSSAA or subject the TSSAA to the status of a state actor for the lack of coercive power over or legally significant encouragement to the TSSAA which would make its actions fairly attributable to the State. The choice here is not one compelled by the State of Tennessee, but one freely exercised by the Respondent Brentwood Academy to voluntarily belong and enjoy the benefits of TSSAA membership. The factual circumstances in each of the *Amici* states is similar and even further removed from involvement with the state than is the TSSAA, and all states would be drastically affected by the adoption of Petitioner's unsupported position, *de jure* or *de facto*.

III. THE STATE DOES NOT CONTROL INTERSCHOLASTIC ASSOCIATIONS AND THE ASSOCIATIONS DO NOT CONTROL THE SCHOOLS.

The question for review can be stated alternatively as, does the state control the interscholastic athletic association such that its actions are tantamount to state action under the Fourteen Amendment as a general uniform constitutional principal?

A. The Structure and Conduct of Interscholastic Athletic Associations Demonstrates That They Are Not State Actors Nor Subject to State Control.

Interscholastic athletic contests in the Sixth Circuit and most states are conducted in a similar fashion by interscholastic athletic associations such as TSSAA, but not all interscholastic athletic associations are identical (See Section I herein). The factual premise for the District

Court's ruling and the thesis for Judge Merritt's sole dissent, including the factual assumption of Footnote 13, *Tarkanian, supra* is that all such associations must be the same and are different than the NCAA, AAU and hundreds of other athletic associations throughout the United States. They are not, as previously presented.

As illustrated in the discussion of Section I of this brief, dissimilarity of structure of (but not the purpose of) interscholastic athletic associations in the respective states is the rule rather than the exception. That discussion shows that a few interscholastic athletic associations are creatures of state statute. The discussion also shows that some, but few, interscholastic athletic associations have been delegated their function directly by legislature or by the state board of education. (See Appendix A). Most interscholastic associations exist independent of any regulatory or oversight control by either the state legislature or any governmental agency or other entity of the state. Such is the case of the TSSAA and all *Amici* participating in this brief. Under these circumstances it is impossible to fashion an across the board classification of interscholastic athletic associations as either state actors or not state actors. Rather, the well established judicial approach to a determination of state actor status must be on an approach consistent with this Court's precedent (See Part II herein).

Many courts have suggested that the approach to the question, considering court precedent, should be on a case-by-case basis. On November 8, 1999 the First Circuit succinctly stated that a case-by-case approach to the proposition is appropriate and necessary. In *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir. 1999) the Court states:

> "The line of demarcation between public and private action, though easily proclaimed, has proven elusive in application. As the Justices, mindful of the fact-sensitive nature of the inquiry, have staunchly eschewed any attempt to construct a universally applicable litmus

> test to distinguished state action from private conduct. Instead, they have directed lower courts to take a case-by-case approach "sifting facts and weighing circumstances so that the non-obvious involvement of the state and private conduct can be attributed its true significance." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 6th LED 2d 45 (1961).

In a prior opinion the Fourth Circuit, *Arlosoroff v. The NCAA,* 746 F.2d 1019 (4th Cir. 1984) stated:

> "There is no precise formula to determine whether otherwise private conduct constitutes "state action." After sifting facts and weighing circumstances, . . ." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722, 81 S. Ct. 856, 860, 6th LED 2d 45 (1961).

"The inquiry in each case was whether the conduct is fairly attributable to the state." *Lugar v. Edmondson Oil Company,* 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 LED 2d 482 (1982).

The function of an interscholastic athletic association is to introduce some order into the conduct of interscholastic athletic programs and assistance in institutional enforcement of uniform rules of eligibility. However, the regulation of interscholastic athletics like intercollegiate athletics is not a function traditionally exclusively reserved for the state. *Jackson v. The Metropolitan Edison Company,* 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 LED 2d 477 (1975). Nor is the administration of interscholastic athletics a public function. *See Tarkanian,* 488 U.S. 197 Note 18, 109 S. Ct. 454 (discussing the NCAA's overriding function of fostering amateur athletics at the college level and noting that "while we have described that function as "critical" by no means is it a traditional let alone an exclusive state function" (citations omitted)); *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee,* 483 U.S. 522, 545, 107 S. Ct. 2971, 97 LED 2d 427 (1987). "Neither the conduct nor the coordination of amateur sports has been a traditional governmental function." *Behagen v. Amateur Basketball*

Association, 884 F.2d 524, 531 (10th Cir. 1989); *McCormack v. National Collegiate Athletic Association,* 845 F.2d 1338, 1346 (5th Cir. 1988); *Ponce v. Basketball Federation,* 760 F.2d 375, 381 (1st Cir. 1985).

Except in those instances where the interscholastic association is either the creature of the state of explicitly subjects it to the authority of the state, neither congress nor the legislature of any state has exercised oversight or control over the rules, regulations or by-laws of an interscholastic association; or, for that matter, any other athletic association including the NCAA or TSSAA. As previously noted, most legislatures of the respective states have opted against exercising control or oversight over the interscholastic association of secondary schools of their states (Appendix A). In such circumstances the presumption and conclusion that the interscholastic association is not a 'state actor' must apply. The clear result, under court precedent, is that the broad rule of no 'state actor' status applies to interscholastic associations operating in their respective states unless (1) the athletic association is a statutory arm of government, *Perkins, supra,* or (2) the state legislature has opted to affirmatively exercise direct statutory and regulatory oversight of the athletic association. Absent such position or affirmative action there is a complete absence of state compulsion or control.

B. Some State Involvement Does Not Mean The TSSAA Is A State Actor.

Even where there is oversight by legislative action of a particular interscholastic athletic association or approval of the eligibility rules by a state agency or, in some instances, a state legislature, which is not present in Tennessee, such approval does not automatically transform the actions of that interscholastic athletic association to a state actor status. As stated in *Arlosoroff, supra*:

> "It is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, the function is not one traditionally reserved for the state, there is no state action." *Rendell-Baker v. Kohn, Blum v. Yaretsky, Polk County v. Don Dodson, Jackson v. Metropolitan Edison Company, supra.* (Citations omitted).

The simple reason for this fact is that interscholastic associations do not control member institutions even when they are structured arms of government. No athletic association in the country, regardless of structure, can dictate to its member institutions what extracurricular activities the member institution is to sponsor. No athletic association has control over a member institution's budget. No athletic association can dictate the use of member institution's facilities. No interscholastic association has independent authority over any member institution or their students. Not one law in any state of this nation requires a high school to be a member of an interscholastic association. What then is the nature of the control exercised by an interscholastic association?

Every private association in this country, regardless of structure, is first and foremost voluntary. No institution is required by any law to form an athletic team or participate in any particular program. No institution is required by any law to place any athletic team in any interscholastic competition, much less tournament competition. No law requires any institution of any state to belong to an athletic association. If an institution chooses to field a team and if the institution further chooses to allow that team to participate in interscholastic competitive athletics, that institution may choose to apply for membership in an association consisting of other institutions who support like competition. The price of admission is that the respective institutions agree to play not only by the same rules of the game, they agree upon the eligibility rules, such as a recruiting rule, for members and participants as minimum standards. The

member institutions are always free to require higher standards than the minimum set forth by the consensus of the membership.

Every rule of a voluntary association is but a statement of the consensus of the opinion of the membership set forth to establish minimum standards so that athletic competition, which is adversarial by nature, can occur on a somewhat level playing field to accomplish the goal of participation in a reasonably equitable competitive environment. To that end, every association serves the common needs of member institutions for regulations of athletics while correlating their diverse interests. Regulations are adopted not as a result of governmental compulsion but in the service of the common interests of the voluntary members. *Anderson v. IHSAA,* 669 F.Supp. 719, 728 (S.D. Ind. 1988).

Not all control is tantamount to state compulsion or state action. The concept of control must not be confused with the concept of coordination of conduct to achieve uniform eligibility rules in voluntary competitive athletics which is an adversarial undertaking by definition. Athletic associations can only enforce a set of rules which the contestants have handed them by mutual voluntary agreement. This agreement does not come from the state and the only available means of enforcement is contractual. The theory of state control or state delegation of authority and the functions of athletic associations are discussed in two cases in the United States.

The first case was decided by the Supreme Court of Kansas in 1996. In *Robinson v. Kansas State High School Activities Association*, 917 P. 2d 836, 844-46 (1996), the court analyzed the nature of an athletic association as follows:

> "The relationship of a voluntary association with its members is governed by contract law. *Cunningham v. Independent Soap and Chemical Workers,* 207 Kansas 812, 818, 486 P. 3d 1316, cert. denied 404 U.S. 985, 92 S. Ct. 453, 30 LED 2d 369 (1971).
>
> * * *

> Nothing compels a high school to join KSHSAA or refrain from withdrawing its membership, if the school is willing to accept the consequences, however unpalatable. Schools are not required to have an interscholastic athletic program.
>
> * * *
>
> "How can the schools organize themselves in interscholastic competition unless they all agree to play by the same rules? How can an individual school board adopt its own rules for interscholastic competition and how to find other schools willing to compete, if each school has difference rules? How is the sport, debate, or music event played out, if each team or group brings along not only its own ball, debate topics, or instruments, but also its own rules? The voluntary aspect in agreeing to abide by KSHSAA's rules is the desire to become involved in interscholastic competition. The nature of interscholastic competition demands that there be a set of rules all competing schools are willing to abide by. It should be understood that a school wanting to compete in sports or other activities with other schools will agree to abide by the rules they all agree on—whether each school may like or dislike a particular rule.

In *Kirby v. The Michigan High School Athletic Association,* 585 N.W. 2d 290, 296, n. 17 (1998), the Michigan Supreme Court described the nature of an athletic association as follows:

> "Athletic competition takes place under a unique set of circumstances. . . . The means and objectives of athletic competition do not always "make sense" in an external fashion—rather, participants seek to better themselves through discipline of striving for goals that exist within the specific rules of each sport.
>
> Ftnt. 17 The articles or bylaws that establish the MHSAA are not part of this record. However, as indicted earlier, the MHSAA is an association of Michigan high schools. Thus, it is a creature of its members, with no independent authority over schools or students. The

schools can and should exercise appropriate oversight of the MHSAA."

Even in those cases where the eligibility rules of the athletic association are subject to oversight by an agency of the state, it does not change the voluntariness of or the contractual aspect of the competing teams to play by those rules since there is no requirement that students participate in interscholastic athletic competition as part of their compulsory education.

Interscholastic associations only administer rules given to them by the membership. The interscholastic association enforces those rules to keep the adversarial contestants within prior agreed upon bounds. When the member exceeds or flaunts those bounds, as did Brentwood, the association's responsibility to its membership is to enforce the rules. The authority of the athletic association is derived from contract between the membership, subject to the laws of the state and not any state authority. Interscholastic associations are generally not state actors because they have no state governmental authority to legislate, mandate or promulgate the rules which the schools must follow apart from the will of its membership. They are merely contractual arbitrators subject to state laws. Review of the actions of the interscholastic association, whether involving a contract, civil right or otherwise is available through the state court and against the public or private members according to existing law. Federal intervention is neither warranted nor appropriate, nor necessary to protect individuals rights.

CONCLUSION

The "state actor" inquiry is a targeted one with the challenged **conduct** at the hub of the analytical wheel. The focal point is the connection between the state and the challenged **conduct** not the broader relationship between the state and the private entity. Regulation, without more, cannot establish the necessary nexus. *See United States*

Olympic Committee, 483 U.S. at 547, 107 S. Ct. 2971; *Blum, supra*. Indeed, even when a state has conferred monopoly status on a private entity, courts will not find state action on the nexus theory absent the snug relationship between the grant of the monopoly power and the challenged conduct itself. *See Jackson, supra,* and *Perkins, supra*. The false premise of Petitioner's perspective is that its claims mistake certain spokes of the analytical wheel for the hub, *i.e.* the centrality of the challenged conduct. The lack of any "symbiotic relationship" belies the applicability of state actor status to the TSSAA. Never, in the history of the United States has sports nor any specific aspect of sports been found to present a fundamental federal right nor constitute an aspect of a state's conduct of education. As a result, a private interscholastic athletic association such as the TSSAA is not a state actor as a general uniform constitutional principal. The Sixth Circuit should therefore be affirmed.

Respectfully submitted,

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APPENDIX A

Survey of Structure and Function of State High School Associations Compiled With the Assistance of the National Federation

Question	Yes	No
1. Is your Association created by your state legislature?	CA, FL, KS, NJ, WA	AL, AS, AZ, AR, CO, CT, DE, DC, GA, HI, ID, IL, IN, IA, KY, LA, ME, MD, MA, MI, MN, MO, MS, MT, NE, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WV, WI, WY
2. Is your Association governed or operated, controlled by a state department of education or other state agency?	CA, DE, DC, MD, NY, NV	AL, AS, AZ, AR, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, LA, ME, MA, MI, MN, MO, MS, MT, NE, NH, NJ, NM, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
3. Does any of your annual revenue come directly from the state?	CA, DE, DC, MD	AL, AS, AZ, AR, CO, CT, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MI, MN, MO, MS, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY
4. Does your Association include public, private and religious schools as full members?	AL, AS, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA, MI, MN, MO, MS, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, UT, VT, WA, WV, WI, WY	MD, TX, VA